Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

FREDRICK D. MERRILL,

Petitioner,

v.

STATE BAR OF ARIZONA, an
instrumentality of the Arizona Supreme Court

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE
ARIZONA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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January 26, 1998

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QUESTIONS PRESENTED FOR REVIEW

There is no unauthorized practice of law statute in Arizona, so non-lawyer citizens of the state can and do provide all of the services that lawyers provide except for appearances in court. Is it a violation of the equal protection clause of the Fourteenth Amendment of the United States Constitution for the Arizona Supreme Court to suspend a lawyer who during a previous suspension provided services for which no license was required?

PARTIES TO THE PROCEEDING

Petitioner, Fredrick D. Merrill, is an attorney and member of the State Bar of Arizona practicing law as a sole practitioner in Phoenix, Arizona.

Respondent, State Bar of Arizona, is an instrumentality of the Arizona Supreme Court, created by Arizona Supreme Court Rule 31(a). The State Bar, *inter alia*, regulates and disciplines attorneys admitted to practice before the courts in Arizona.

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PETITION FOR A WRIT OF CERTIORARI TO THE
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Fredrick D. Merrill hereby petitions for a writ of certiorari to review the order of the Arizona Supreme Court suspending him from the practice of law as recommended by the State Bar of Arizona.

OPINION BELOW

The hearing committee's report in the present case was filed with the State Bar of Arizona Disciplinary Commission on

August 7, 1996. The report is not published but is included in the Appendix at 1a—34a.

The Disciplinary Commission report recommending the suspension of Mr. Merrill is dated February 13, 1997; the report is not published but is included in the Appendix at 35a—57a. The Arizona Supreme Court judgment and order denying Mr. Merrill's petition for review and imposing a one-year suspension is dated October 30, 1997. The judgment and order has not yet been published, but is included in the Appendix at 62a—64a.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1257. The Supreme Court of Arizona entered its order in this matter on October 30, 1997.

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in part:

> All persons born or materialized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Rule 63, Rules of the Supreme Court of Arizona, 17A A.R.S., is set forth in the Appendix at 65a—69a.

STATEMENT

The petitioner, Fredrick D. Merrill was admitted to the State Bar of Arizona on October 13, 1979. He was suspended from the practice of law in 1994 for a period of ninety days by order of the Supreme Court of Arizona dated May 24, 1994. Appendix at 58a—61a.

During this suspension Mr. Merrill complied in all respects with the order suspending him, but he did not close his

office. Instead, he contracted with two lawyers to perform services for his clients during his suspension and paid them on an hourly basis to perform services like meeting with clients, signing pleadings and making court appearances. Mr. Merrill worked as a paralegal, charging a paralegal rate for his services. He signed no correspondence or pleadings during his suspension, and he did not appear in court.

After being reinstated, Merrill was again charged by the bar's disciplinary committee. In essence, it charged Merrill with practicing law during his three-month suspension. However, during the hearing on this second charge, it became clear that no definition of or prohibition against the practice of law exists in Arizona because Arizona repealed this law in 1984. As a result, anyone in Arizona can and many non-lawyers do provide for-fee services traditionally thought to be the province of attorneys like the preparation of divorce papers, bankruptcy filings, pleadings, wills, trusts, estate plans, articles of incorporation, *etc.*, and the giving of advice

concerning such matters. There is a provision in Arizona's constitution, ARIZ. CONST., art. 26, § 1, that preserves the right of real estate agents to engage in a "limited law practice" because they can give advice about and draft contracts, deeds, mortgages, leases, *etc*. *See, Olson v. Neale*, 116 Ariz. 522, 570 P.2d 209 (Ct. App. 1977).

Although this proceeding was begun for the purpose of addressing Merrill's allegedly unauthorized practice of law during his prior suspension, the State Bar was troubled by what "practice of law" means in Arizona, so it declined to find that Merrill was involved in the unauthorized practice of law while he was suspended. Instead, the State Bar amended its complaint during the disciplinary hearing to allege that Merrill had violated a rule the underlying order of suspension had omitted from the requirements imposed upon Mr. Merrill. The omitted rule provides in pertinent part:

> Respondent, after entry of a judgment of disbarment or suspension, shall not . . . engage

> as a lawyer for another in any new case or legal matters of any nature.

Rule 63, Rules of the Supreme Court, 17A A.R.S., Appendix at 65a—69a.

Since Merrill had kept his office open, worked as a paralegal and run those aspects of his office that did not require an admitted lawyer, the State Bar of Arizona recommended and the Arizona Supreme Court ordered an additional, one-year suspension based upon the supreme court's rule that, in essence, prohibited a suspended lawyer from practicing law.[1]

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[1] The State Bar appoints hearing committees to conduct hearings where attorneys are cited for violations of the rules adopted by the Arizona Supreme Court. A hearing committee's findings and recommendations are submitted to the Disciplinary Commission whose members are appointed by the Arizona Supreme Court. The commission reviews the findings and recommendations of the hearing committee. The commission may impose sanctions of reprimand, probation or censure without any action by the Arizona Supreme Court. If a censure is "appealed" or the commission recommends a suspension or disbarment, the record before the hearing committee is forwarded to the Arizona Supreme Court for determination.

After the Disciplinary Commission submitted its report and recommendation to the Arizona Supreme Court, and before the court made its determination, Mr. Merrill submitted a petition for review pursuant to Rule 53(e)(1). In that petition, at pages 7 and 8, Mr. Merrill raised the issue of the lack of a definition of the unauthorized practice of law and the lack of specificity as to what a suspended attorney is able to do, and argued that an equal protection issue had been raised that the commission was unable to answer. Pages 7 and 8 of petitioner's brief on petition for review is included herewith at Appendix 70a—74a. The Arizona Supreme Court reviewed the case and rejected Mr. Merrill's position without comment. *See* , Arizona Supreme Court judgment and order in the Appendix at 62a—64a.

REASONS FOR GRANTING THE PETITION

The recommendation of the disciplinary commission and the action of the Arizona Supreme Court in approving and adopting the commission's report yields the anomalous result

that an attorney in Arizona who is suspended from the practice of law is unable to engage in activities in which all other citizens in Arizona are able to engage whether they are admitted lawyers or not. The right to practice law or pursue any profession is constitutionally protected from unreasonable governmental interference. *See. Greene v. McElroy*. 360 U.S. 474, 79 S.Ct. 1400, 3 L.Ed.2d 1377(1959) (right to hold specific employment is within liberty and property concepts of the Fifth Amendment); *Konigsberg v. State Bar*, 353 U.S. 252, 77 S.Ct. 722, 1 L.Ed.2d 810 (1957) (lawyer's interest in pursuing his calling is protected by due process clause of the Fourteenth Amendment). Therefore, there must be at least a rational basis for deciding that Merrill as a suspended member of the State Bar of Arizona could not "practice law" when anybody else in Arizona could. There is no such rational basis; therefore, the action of the Arizona Supreme Court is constitutionally defective.

Under decisions of the Court dealing with classifications

where the law is applied to citizens unevenly, the classification must rationally further a legitimate state interest and the classification must not involve invidious discrimination or be arbitrary or capricious.

> [T]he classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike . . . .

F.S. Rayster Guano Co. v. Virginia, 253 U.S. 412, 415, 40 S.Ct. 560, 561-562, 64 L.Ed. 989 (1920).

> In general, the Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification, see *United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 174, 179, 101 S.Ct. 453, 459, 461, 66 L.Ed.2d 368 (1980), the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decision maker, see *Minnesota v. Clover Leaf*

> *Creamery Co.*, 449 U.S. 456, 464, 101 S.Ct. 715, 724, 66 L.Ed.2d 659 (1981), and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational, see *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S., at 446, 105 S.Ct., at 3257.

Nordlinger v. Halm, 505 U.S. 1, 112, S.Ct. 2326, 2332, 120 L.Ed.2d 1 (1992).

Unlike the common situation where a state legislature has made a classification of its citizens based on what it believes to be some positive, public-policy goal, the unequal treatment between what non-lawyers and suspended lawyers may do arises in this case because two branches of state government are implementing different policies. Since the legislature in Arizona allows anyone to do what the Arizona Supreme Court sanctioned Merrill for doing, there is no rational basis for the courts to treat lawyers and non-lawyers differently with respect to services for which a license to practice law is

not required by the legislature or the public policy of Arizona.

CONCLUSION

This case involves an invidious discrimination by the State Bar of Arizona because it sanctioned one of its members for doing what any other citizen of Arizona can do. The State Bar, thereby, interferes with constitutionally protected rights. Since there is no rational basis for this action, this Court should overturn the decision of the Arizona Supreme Court.

Respectfully submitted,

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APPENDICES

Appendix A	Hearing Committee Report
Appendix B	Disciplinary Commission Report
Appendix C	Arizona Supreme Court Judgment and Order Dated May 24, 1994
Appendix D	Arizona Supreme Court Judgment and Order Dated October 30. 1997
Appendix E	Arizona Supreme Court Rule 63
Appendix F	Excerpt From Respondent's Brief On Petition For Review

Appendix A

BEFORE THE STATE BAR OF ARIZONA

HEARING COMMITTEE 6D

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA	)	No. 94-1394, 95-0235, and 95-0370
FREDERICK D. MERRILL Bar No. 005916	)	HEARING COMMITTEE REPORT
Respondent.	)	

This matter cane on for hearing before Hearing Committee 6D on June 25, June 26 and July 10, 1996. Respondent appeared *in pro per*., and the Bar was represented by Yigael Cohen, Esq. The hearing was left open to permi. the Bar to file transcripts of the deposition of two witnesses, to be closed one week later. The transcripts were filed on July 15, 1996, and the matter was submitted to the Committee for decision on July 22, 1996.

This report contains the findings of fact, conclusions of law and recommendation of the hearing committee.

REPORT

I. INTRODUCTION.

The Bar's four-count complaint alleges two counts of practicing law while under suspension, one count of failure to supervise a non-lawyer employee and one count of two instances of prior discipline. At the hearing, the Bar was permitted to amend its complaint to allege violations of Supreme Court Rule 63 (duties of suspended lawyer).

The Committee unanimously finds that the Bar has proved by clear and convincing evidence that Respondent violated Supreme Court Rule 63, subsections (a), (b) and (c), and recommends that Respondent be suspended from the practice of law for one year.

II. FACTS.

A. Respondent's Suspension.

Respondent was suspended from practice for ninety days by Supreme Court order dated May 24, 1994. The suspension was effective on June 24, 1994. Upon Respondent's filing a

Rule 71(c) affidavit without opposition by the Bar, Respondent was reinstated on October 6, 1994.

The suspension, by consent, arose from Respondent's dealings with the funds of a ninety-year-old client. See, Disciplinary Commission Report in No. 92-0485 (March 8, 1994). Respondent failed to account for $4,000 for art appraisals and took undocumented loans of $5,500. The funds were restored. Violations of ER 1.8(a) (conflict of interest) and ER 1.15 (safekeeping property) were found. The Commission found one factor in aggravation and numerous mitigating factors.

B. Respondent's Practice and Actions Prior To and During Suspension.

Respondent, admitted to the Bar in 1978, practices as a sole practitioner. In 1994, he had three, full-time employees: a secretary, a secretary/paralegal and another paralegal. His practice was described on the building directory as "The Law

Office of Frederick D. Merrill."[2] Respondent testified that before his suspension he made the notifications to clients required by Supreme Court Rule 63(a). No copies of the notifications were produced at the hearing, but the Bar did not dispute Respondent's testimony. According to Respondent, all of his clients wished him to continue with their representation notwithstanding his suspension.

Respondent contracted with two lawyers to perform services for his client during his suspension: a Ms. Tara Brigham, a newly-admitted lawyer who officed in her home, and a Mr. David Kennedy, an experienced practitioner whose office was in the same building as Respondent's. Respondent paid them by the hour ($40 to $50 for Ms. Brigham and $100 for Mr. Kennedy) to perform services described as meeting with clients, signing pleadings and making court appearances.

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[2]Pleadings filed during the pertinent period were on the letterhead of "Frederick D. Merrill, P.C.," although Respondent testified that the professional corporation had been dissolved many years previously.

During Respondent's suspension, the pleadings signed by Ms. Brigham and Mr. Kennedy were on the letterhead of "Frederick D. Merrill, P.C.", and their signatures were affixed following the word "by".

Both Ms. Brigham and Mr. Kennedy testified that they had no responsibility for obtaining retainers, receiving payments, disbursing funds or any other client financial matters. Both testified that they had little, if any, supervisory responsibility over the non-lawyer employees in Respondent's office. Both continued to maintain their own practices. All files on which they worked for Respondent were kept in Respondent's office. Pleadings were prepared by Respondent's employees (one of his paralegals, his secretary or himself) and submitted to them for review and signature.

Respondent testified that he was not always in the office during his suspension; but, when he was, he would from time to time attend meetings with clients and one of his paralegals, Ms. Brigham or Mr. Kennedy. He continued to review all

incoming correspondence and pleadings. He denies sending any correspondence or signing any pleadings with his own name. The Bar did not challenge or disprove this testimony.

While suspended, Respondent billed clients for his time at a paralegal's hourly rate.

During Respondent's suspension, all outgoing correspondence and pleadings, whether signed by a secretary, paralegal, Ms. Brigham or Mr. Kennedy, went out on the letterhead of "The Law Office of Frederick D. Merrill" or "Frederick D. Merrill, P.C." The same description remained on the building directory and the door of the law office. Respondent's business cards continued to be displayed on the reception desk. Phones were answered, "Law Office of Fred Merrill." There was no outward indication to the public or clients that Respondent was under suspension.

Respondent testified that his office staff, as well as Ms. Brigham and Mr. Kennedy, were instructed to be honest about his suspension if, as and when asked by clients or others. There

was, however, no requirement that they volunteer this information. Mr. Kennedy testified that he gave a "set speech" about Respondent's suspension when meeting Respondent's clients for the first time.

During his suspension, respondent remained the sole signatory on his trust account and general, operating bank account. He signed and issued checks from the trust account; signed and issued payroll checks to his non-legal staff; and signed and issued checks to Ms. Brigham and Mr. Kennedy for their services. Respondent took draws from his office account during this period.

While suspended, Respondent continued to act in a supervisory role over his non-legal employees and had the right to hire and fire them.

There were one or more new engagements[3] accepted by

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[3]Respondent estimated at least five, no more than ten. The Marella case (Count Three, below) is the only one about which specifics were supplied.

Respondent's office during his suspension. In these cases, Respondent testified that one of his non-legal staff conducted the initial meeting and established the fees to be paid pursuant to Respondent's usual fee schedule. Monies received were deposited into his trust account or general operating account (if, for example, the representation was for a fixed fee).

In adopting the practices discussed above, Respondent did not seek guidance from the Bar's staff or its Committee on Rules of Professional Conduct. He had general discussions with his counsel in the prior disciplinary proceeding, but did not discuss the specifics of his plan to maintain his firm's practice during his suspension.

C. Count One (King).

This count involves Respondent's continuing to act in a limited role for a client following his suspension.

Shortly before his suspension was effective on June 24, 1994, Respondent was contacted by an existing client named Jack King, who confessed that he had been involved in a

$400,000 "check-kiting" scheme involving First Interstate Bank of Arizona ("FIBA"). He wanted Respondent to contact FIBA to determine whether it would be amenable to a work-out agreement to include an agreement not to make a criminal reference to the FBI or other federal agencies.

Respondent knew Dan Durrant, a senior litigation partner in Streich Lang, an outside counsel for FIBA. Respondent and Mr. Durrant belonged to the same church, in which they were both active. Mr. Durrant was a counselor to the Stake President, and Respondent was involved in committees of the church. Respondent told the Stake President that he had been suspended from the practice of law and assumed that the President would tell Mr. Durrant. Respondent has no recollection of telling Mr. Durrant that he had been suspended, but Mr. Durrant testified that Respondent told him so in a telephone call.

Respondent approached Mr. Durrant at a church meeting to discuss his client's problem and later telephoned Mr.

Durrant's office. Mr. Durrant agreed to meet with Respondent. At the meeting on June 24, 1994, Mr. Durrant called in Mr. James LeValley, a former partner of Mr. Durrant who at the time was on the legal staff of FIBA. According to Respondent, he explained to Mr. Durrant in the preceding telephone conversation that he was not acting as a lawyer for the client but was acting merely as a business advisor and friend and was attempting to ascertain information regarding FIBA's position. When Mr. LeValley was called into the meeting, Respondent's testimony was that he did not mention that he had been suspended from the practice of law, while Mr. Durrant's testimony was that he has a "strong belief" that the subject was mentioned. Mr. LeValley referred the matter to a Dan Bergin, a subordinate on the FIBA legal staff. Mr. Bergin testified that Mr. LeValley had told him that there was a potential "check-kiting" problem and quoted Mr. LeValley as having said that Mr. Durrant told him, i.e., LeValley, that the bank customer's attorney had called him and wanted, on behalf of his client, to

resolve the problem. Upon investigation, Mr. Bergin determined that there was a significant amount of money involved, called on of FIBA's other outside counsel, James Ball, and asked him to handle the matter.

Mr. Ball who also testified at the hearing, set up a meeting at the bank with Respondent, Mr. Ball, Mr. Bergin and one of FIBA's operations employees. At the meeting, Messrs. Bergin and Ball explained FIBA's position. Subsequently, within a day or two, Mr. Bergin learned that Respondent had been suspended. The only thing Respondent said was that he would take FIBA's position to his client. The meeting was described as brief by all participants.

Mr. Ball testified that at the time of his initial contact was FIBA he was unaware of Respondent's suspension, although in another case involving a small bankruptcy matter his firm had received a letter from Respondent regarding his suspension. Mr. Ball was subsequently reminded of the letter by an associate. Mr. Ball's impression was that Respondent

was a lawyer representing a client at the meeting. When he was telephoned by Respondent to arrange the meeting, Mr. Ball expressed concern about Respondent's suspension and stated that he did not want to be involved in facilitating the unauthorized practice of law. Respondent said he was merely acting as a business advisor. According to Mr. Ball, at the meeting he dealt directly with Mr. King, the client. While Respondent was present, he did not actively participate.

Mr. Ball later discovered that his firm had a conflict of interest because it represented the second bank in the "check-kiting" scheme. The matter was referred to other, outside counsel for FIBA. Respondent and Mr. Kennedy (one of the Respondent's contract lawyers) both testified that the matter was brought to a satisfactory resolution by new counsel for FIBA and Mr. Kennedy.

The complaint before the Bar was not filed by Mr. King but was, instead, filed by Mr. Ball.

D. Count Two (Klock).

This count does not involve an allegation of Respondent's practicing law while suspended but, instead, concern's Respondent's duty to supervise a non-lawyer assistant under ER 5.3.

Mr. Robert Silvert was a paralegal hired by Respondent in 1992. He had three years of law school (no degree) and work experience in the Attorney General's office and with Community Legal Services. He was convicted in 1990 of one felony count of fraudulent schemes and was placed on seven years' probation.

Mr. Silvert was initially a good source of business for Respondent and brought in a number of new clients. Respondent testified that he supervised Mr. Silvert very closely at the beginning of their relationship, but later became "lax" in his supervision, although he never gave Mr. Silvert "full case responsibility" for any matter.

On June 4, 1994, a Mr. Jerry Klock was arrested in Arizona on a fugitive from justice warrant from the State of

Nevada on an underlying drug charge. He was referred to Respondent's offices by a bail bondsman who was a friend of Mr. Silvert. Mr. Silvert handled the initial meeting with Mr. Klock and accepted a retainer on behalf of the firm. Mr. Klock asked Mr. Silvert to ascertain what Mr. Klock needed to do to resolve the matter in Nevada.

Mr. Silvert telephoned a Clark County, Nevada, assistant district attorney named Scott Mitchell. Mr. Silvert did not identify himself as a paralegal or a lawyer but merely said, "This is Robert Silvert of the law office of Fred Merrill." Mr. Mitchell assumed that Mr. Silvert was a lawyer and advised Mr. Silvert that, if Mr. Klock would appear in Clark County without the necessity of extradition, the district attorney's office would permit Mr. Klock to plead guilty to the underlying drug charge and enter a diversion program.

Mr. Silvert relayed this information to Mr. Klock and, with Mr. Klock's consent, upon a referral from the same bail bondsman, contacted Las Vegas lawyer Robert Pancoast,

identified himself as he had to the district attorney ad asked if Mr. Pancoast could appear at a preliminary hearing with Mr. Klock that morning. They discussed Mr. Pancoast's fee, and Mr. Pancoast agreed to the representation. He subsequently attended the hearing with Mr. Klock, and the matter was resolved as the district attorney had agreed. Mr. Pancoast, who had reason to be disgruntled because it took significant efforts (including the filing of his Bar complaint here) to be paid his fee, testified that the agreement was negotiated before he was involved. He described it as "an excellent deal" for Mr. Klock.

Mr. Klock, according to Mr. Silvert, never met Respondent.

Respondent testified that he had been advised in a number of instances that Mr. Silvert was not identifying himself to third persons as a paralegal and, each time, admonished him. Mr. Kennedy, of the contract attorneys, testified that he brought the same problem to Respondent's attention on five to ten occasions. None of these instances was related in time to the

Klock matter.

Mr. Pancoast, the defense lawyer in Las Vegas, testified that he, like the assistant district attorney, "simply assumed" that he was dealing with a lawyer in his conversation with Mr. Silvert. Both Mr. Mitchell and Mr. Pancoast testified that they would not have said or done what they did had they known they were dealing with a legal assistant rather than a lawyer.

Mr. Silvert later left Respondent's employment under circumstances not explained at the hearing.

E. Count Three (Marella).

This count raises a host of issues, the most significant being Respondent's firm's retention by a new client during his suspension.

Before the suspension, a Mr. Peter Marella contacted Mr. Silvert, Respondent's paralegal, for representation in a Maricopa County charge of driving under the influence. Mr. Marella was serving a one-year probation in Gila County for a similar offense, which probation was to expire in December,

1994.

Mr. Silvert met with Mr. and Mrs. Marella on July 11, 1994, during Respondent's suspension, and accepted a retainer of $1,000-1,500 on behalf of Respondent's firm.

On July 18, 1994, Mr. David Kennedy filed a notice of appearance on behalf of Mr. Marella on Respondent's letterhead pleading paper and filed two, subsequent motions for continuances of the arrangement. Mr. Kennedy has no specific recollection of the Marella matter, but "assumes" that he met with them. Ms. Tara Brigham subsequently made on or more court appearances on behalf of Mr. Marella. Respondent, after his reinstatement, was involved in the ongoing representation. The Marellas claim that they were never informed that Respondent was under suspension. Other witnesses could not recall whether the Marellas were given a letter or otherwise informed of Respondent's suspension. Respondent never met with Mr. or Mrs. Marella until after his reinstatement.

The rest of the Marellas' complaint is a mass of

contradictions, denials, and disputes in the testimony regarding whether Respondent was or was not supposed to move for a continuance of trial, the effect of the plea agreement upon the Gila County probation, whether the Marellas were told the Respondent was too busy on other cases to handle theirs, and other matters. These complaints involve the credibility of the various witnesses, with no clear resolution. The Committee cannot and does not make any further factual determinations, finding that the Bar has failed to prove these charges by clear and convincing evidence.

F. Count Four (Prior Discipline).

Respondent has been previously disciplined twice:

1. A three-month suspension in case No. 92-0485, discussed above; and

2. An informal reprimand in case No. 92-1136, for a violation of ER 1.15 (failure to pay $605 to a lien claimant in a personal injury case).

G. Supreme Court Rule 63.

The Committee granted the Bar's amendment during the hearing on June 26 to allege violations of Supreme Court Rule 63 ("Notice to Clients, Adverse Parties and Other Counsel"). Since the hearing was continued to July 10, Respondent was given two weeks within which to respond.

Rule 63(a) requires a lawyer under order of suspension to give various notices and provides further:

> In the event the client does not obtain substitute counsel before the effective date of the . . . suspension it shall be the responsibility of the . . . suspended . . . lawyer to move in the court or agency in which the proceeding is pending for leave to withdraw.

Rule 63(b) requires a suspended lawyer to deliver to all clients being represented in pending matters any papers or other property to which they are entitled.

Rule 63(c) provides, in part, that "Respondent, after entry of a judgment of . . . suspension, shall not accept any new retainer or engage as lawyer for another in any new case or legal

matter of any nature." Rule 63(c) also requires the return of unearned fees.

There was no substitution of counsel in Respondent's cases during the period of suspension, nor did he move to withdraw. Respondent did not return files, records or property to clients represented at the inception of his suspension but, instead, retained those files and records on his premises and retained clients' unearned fees in his trust and general operating accounts. Respondent accepted at least one new retainer during his suspension.

III. CONCLUSIONS.

Under Count One (King), the Bar has proven by clear and convincing evidence that Respondent violated Supreme Court Rule 63(a)(3). The Bar has failed to prove by clear and convincing evidence that Respondent violated ER 5.5 or Supreme Court Rules 51(e) or 51(k).

Under Count Two (Klock), the Bar has failed to prove by clear and convincing evidence that the Respondent violated

ER's 5.3, 5.5 or 8.4. At the hearing the Bar voluntarily withdrew its charge of a violation of ER 8.1(a).

Under Count Three (Marella), the Bar has proven by clear and convincing evidence that Respondent violated Supreme Court Rule 63(c). The Bar has failed to prove by clear and convincing evidence that Respondent violates ER's 1.2, 1.3, 1.4, 5.5, or 8.4 or Supreme Court Rules 51(e) or 51(k).

Under its amended allegations, the Bar has proven by clear and convincing evidence that Respondent violated Supreme Court Rules 63(a)(3), 63(b) and 63(c).

IV. DISCUSSION.

A. Unauthorized Practice of Law; Rule 63.

The primary thrust of the Bar's complaint is that Respondent practice law while suspended. Such a charge raises definitional, jurisdictional, and, perhaps, constitutional issues.

There is no definition of the unauthorized practice of law in the Model Rules of Professional Conduct or in any rule of the Supreme Court. The discussion in State Bar of Arizona

v. Arizona Land Title & Trust Co., 90 Ariz. 76, 366 P.2d 1 (1961), is general and not helpful. Except for Rule 63, there is no disciplinary rule addressing the effect of a suspension from practice.

Supreme Court Rule 31(a)(3) provides that "no member shall practice law in this state or hold himself out as one who may practice law in this state, while suspended . . . ." ER 5.5 prohibits a lawyer from practicing law "in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction" or from "assist[ing] a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law." Supreme Court Rule 51(e) prohibits "Willful disobedience or violation of a rule or order of a court requiring him to do or forebear to do an act connected with or in the course of his profession." The Supreme Court judgment entered against Respondent here ordered him "suspended form the practice of law for a period of ninety days" and admonished him to comply with Supreme Court Rules

63(a) and (d), without referring to his obligations under Supreme Court Rules 63(b) or 63(c).[4]

Except for Rule 63, a lawyer facing suspension has no way of knowing what he may or may not do. Opinions of counsel or the Bar would be unavailing in the absence of clear definition from the Supreme Court. The Bar's Committee on Rules of Professional Conduct might decline such an inquiry as presenting a question of law, not ethics, since there is no definition of the unauthorized practice of law in the Model Rules of Professional Conduct.

Here, Respondent violated three, separate subsections of Supreme Court Rule 63. There are serious questions raised by the way in which Respondent continued to maintain his practice during his suspension. If not for the violations of Rule 63, the Committee would be inclined to dismiss the charges against Respondent for vagueness, uncertainty and lack of notice or,

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[4]The Committee has suggested to the Bar a change in the wording of future orders to correct this omission.

perhaps, to make findings of fact and refer this matter to the Disciplinary Commission without recommendation.

There is a question whether subsequent disciplinary proceedings, as opposed to proceedings for contempt, are an appropriate remedy for Rule 63 violations. See, e.g., Supreme Court Rule 63(d) (failure to file affidavit after suspension punishable by contempt). Respondent did not argue this point. The Committee assumes that it has jurisdiction under Supreme Court Rules 51(b) (violation of a rule of professional conduct) and 51(f) (violation of a discipline rule or order).

B. Specific Findings.

In Count One (King), there was a violation of Rule 63(a). Respondent did not notify all adverse counsel with whom he was dealing that he was suspended. The testimony of Messrs. Bergin and Ball was not contradicted. While Mr. Durrant acknowledged receiving such a notice, a lawyer cannot delegate his Rule 63(a) obligation.

In Count Two (Klock), there was no violation of ER 5.3.

There was no showing of a failure to supervise. The only thing which Respondent could have failed to supervise was Mr. Silvert's arguably unauthorized practice of law under ER 5.5. Since there is no definition of this activity in Arizona, the Committee cannot and will not find an ethical violation.

In Count Three (Marella), there was a violation of Rule 63(c). Respondent, through his non-lawyer employee, Mr. Silvert, accepted a new retainer to provide legal services during his suspension.

The other Rule 63 violations (failure to substitute or withdraw as counsel, failure to return client property and funds) have been discussed above and are established in the record. Respondent argues that Rule 63 should not be applied to a sole practitioner like him. That argument must be made only to the Supreme Court, since the literal, technical and plain meaning of Rule 63 allows for no ambiguity or uncertainty.

C. Responsibility of Bar.

Since the ultimate goal of bar discipline is the protection

of clients, the Committee addresses here its perception of a systemic failure on the part of the Bar to effectively implement and monitor suspensions of practicing lawyers.

The first issue has to do with orders of suspension for less than six months. As noted in the Commentary to ABA Standard 2.3, "short-term suspensions with automatic reinstatement are not an effective means of protecting the public." The commentary goes on to observe,

> When shorter suspensions [than six months] are imposed, lawyers can merely delay performing the requested services. If the lawyer eventually completes the work for the client and received a fee, the suspension has only served to inconvenience the client. In reality, a short-term suspension functions as a fine on the lawyer.

See also discussion in In re Shannon, 179 Ariz. 52, 876 P.2d 548, 567 (1994). Respondent testified here that, because of the shortness of his ninety-day suspension, he intended to put his practice during that period into a "maintenance' mode by

adopting the procedures discussed above.

Following a short-term suspension (six months or less), the Bar's practice is not to file an opposition to the perfunctory, Rule 71(c) affidavit for reinstatement unless there is an open complaint against the lawyer. The Committee believes that this is an insufficient safeguard. The entire procedure for reinstatements should be reviewed if the current practice of suspending lawyers for six months or less continues.

Having obtained the suspension of a practicing lawyer, the Bar has a responsibility to tell the lawyer what he may or may not do during suspension. Further, the Bar should undertake an independent investigation, whether through LOMAP, a staff investigator, staff counsel or an independent practice monitor, to ensure that the suspended lawyer is complying at least with Rule 63. The Bar has the right to request a conservator under Supreme Court Rule 65 to protect client interests. Reliance upon the practitioner's Rule 63(d)

affidavit, alone, is insufficient to protect the public.[5]

Underlying all of this is the Committee's belief that, had anyone from the Bar walked into Respondent's office on the day after his suspension and seen "business as usual" being conducted, something would or certainly should have been done.

D. Recommended Sanction.

The Committee has considered the ABA Standards for Imposing Lawyer Sanctions.

Under Standard 3.0, the Committee finds that the duty violated was one owed to the profession and to clients;[6] that the Respondent's mental state was knowing; and that Respondent's actions caused no potential or actual injury to clients.

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[5]Respondent's Rule 63(d) affidavit was not introduced into evidence.

[6]The disciplinary Commission has analyzed practicing law while under suspension as a violation of a duty owed to the profession. See, e.g., Larriva, No. 93-0558. Supreme Court Rule 63 was obviously designed, in large part, to protect clients.

Factors in aggravation (Standard 9.2) are prior disciplinary offenses (although neither involved the issues presented here), a selfish motive in Respondent's desire to maintain his practice during suspension and substantial experience in the practice of law.

Factors in mitigation (Standard 9.3) include full and free disclosure, a cooperative attitude toward these proceedings and Respondent's remorse. He admitted, in hindsight, that he should have done things differently, although he was not specific about what he would have done differently.

The Arizona authorities suggest that practicing law while under suspension, where there has been a previous finding of unprofessional conduct, requires disbarment. See, e.g., Matter of Tarletz, 165 Ariz. 243, 798 P.2d 381 (1991), and Matter of Phelps, 154 Ariz. 516, 744 P.2d 428 (1987). The ABA Standards agree. See Standard 8.0 (Prior Discipline Orders): "the most common case [of disbarment] is one where a lawyer has been suspended but, nevertheless, practices law.

The courts are generally in agreement in imposing disbarment in such cases." These authorities, however, are based upon a finding of actual or potential injury to clients, a factor which is not present here.

The Committee has reviewed the matrix of disciplinary cases and decisions of the Arizona Supreme Court for proportionality and does not find any case close enough to the facts here to be instructional or informative. The Disciplinary Commission in Stevens, No. 93-0821, report adopted, 178 Ariz. 261, 872 P.2d 665 (1994), said that "The unauthorized practice of law is a serious ethical violation, and one that would usually result in a suspension, at least." Supreme Court Rule 63 was not involved.

Disbarment is too harsh and inappropriate a sanction for Respondent's actions. There is no "bright line" to ascertain when a lawyer has practice law in violation of a suspension order; but there are requirements in Supreme Court Rule 63 as to what a lawyer must and must not do while suspended. Since

knowing violations of Rule 63 occurred in this case, the Committee concludes, for deterrence, that Respondent should be suspended from the practice of law for a period commensurate with the gravity of his offenses. The Committee recommends a one-year suspension, as well as pre-suspension and pre-reinstatement monitoring of Respondent's compliance with Supreme Court Rule 63 to protect the public.

V. RECOMMENDATION.

The Committee RECOMMENDS as follows:

1. Respondent, Frederick D. Merrill, be suspended from the practice of law for a period of one year for violations of Supreme Court Rules 63(a), 63(b) and 63(c).

2. Not later than ten days prior to the effective date of the suspension, the director of the Law Office Management Assistant Program ("LOMAP"), her designee or a practice monitor appointed by her shall personally meet with Respondent to ensure that he has complied, will comply and has put in place procedures to ensure his compliance with Supreme

Court Rule 63 in all respects. If not, the Bar shall consider appointment of a conservator under Supreme Court Rule 65(a).

3. If Respondent applies for reinstatement, the same person or another designated by the LOMAP director will review Respondent's activities and actions during the period of suspension to determine whether Supreme Court Rule 63 was complied with by Respondent and shall file a report with the State Bar, to be considered along with the other matters required by Supreme Court Rules 71 and 72 as conditions of reinstatement.

4. Costs of the foregoing procedures shall be borne by Respondent.

5. Costs of this proceeding shall be assessed against and borne by Respondent.

DATED this 7th day of August, 1996.

s/s

F. Pendleton Gaines, III
Chairman - Hearing Committee 6D

For the Committee

ORIGINAL OF THE FOREGOING
delivered this 7th day of August, 1996, to.

Ms. Rosemary B. Martin
Disciplinary Clerk
State Bar of Arizona
111 West Monroe, Suite 1800
Phoenix, AZ 85003-1742

COPY OF THE FOREGOING
mailed this 7th day of August, 1996, to:

Frederick D. Merrill, Esq.
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Alternate - Hearing Committee 6D

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8401 West Monroe, Room 340
Phoenix, AZ 85345-6540
Member - Hearing Committee

s/s

Appendix B

BEFORE THE DISCIPLINARY COMMISSION
OF THE
SUPREME COURT OF ARIZONA

In the Matter of	)	Comm. Nos. 94-1394,
	)	95-0235 & 95-0370
FREDRICK D. MERRILL,	)	
Attorney No. 005916	)	
a Member of the	)	DISCIPLINARY
State Bar of Arizona,	)	COMMISSION
	)	REPORT
	)	

This matter came before the Disciplinary Commission of the Supreme Court of Arizona on December 14, 1996, for oral argument on the Hearing Committee's recommendation of suspension and probationary terms, pursuant to Rule 53(d), Ariz. R.S.Ct. The respondent, Fredrick D. Merrill ("Merrill"), filed an objection to the Hearing Committee's recommendation.

Decision

With five members concurring and three members

dissenting,[1] the Commission adopts the findings of fact, conclusions of law, and recommendation of the Hearing Committee that:

1. Merrill shall be suspended for a period of one year.

2. Not later than ten days prior to the effective date of the suspension, the director of the Law Office Management Assistance Program ("LOMAP") or her designee shall personally meet with Merrill to ensure that he has complied, will comply, and has put in place procedures to ensure his compliance with Supreme Court Rule 63 in all respects. If he has not, the State Bar shall consider appointment of a conservator under Supreme Court rule 65(a);

3. If Merrill applies for reinstatement, the same person or another designated by the director of LOMAP shall

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[1]Commissioner Ortega did not participate in these proceedings. Commissioners Malm, Bonwell, and Potts dissent, in the belief that a shorter suspension is warranted.

review Merrill's activities and actions during the period of suspension to determine whether Merrill complied with Rule 63, and shall file a report with the State Bar to be considered along with the other matters required by Supreme Court Rules 71 and 72; and

4. Any and all costs associated with these recommendations shall be borne by Merrill.

Facts

Merrill was admitted to the State Bar of Arizona on October 13, 1979. He was suspended from the practice of law for a period of ninety days by court order dated May 24, 1994. That suspension became effective on June 24, 1994.

Prior to his suspension, Merrill was a sole practitioner at "The Law Office of Fredrick D. Merrill." While suspended, Merrill continued to maintain his office, receive mail, and occasionally meet with clients. He signed no pleadings and billed all of his time at paraglegal rates.

He contracted with two lawyers to perform services for

his clients during his suspension; tara Brigham, a newly-admitted lawyer, and David Kennedy, an experienced practitioner. Merrill paid them by the hour to meet with clients, sign pleadings, and make court appearances. They did not work out of Merrill's office, and had no supervisory responsibilities over his staff, which consisted of three non-lawyers. Pleadings were prepared by Merrill's employees and submitted to Ms. Brigham and Mr. Kennedy for review and signature. The pleadings were on the letterhead of "Fredrick D. Merrill, P.C.," and Ms. Brigham's and Mr. Kennedy's signature followed by the word "by."

The complaint in this matter arises out of his office's involvement in three cases during his period of suspension.

Count One involves Merrill continuing to act in a limited role for his client following his suspension. Shortly before Merrill's suspension began, his client, Jack King, confessed to him that he had been involved in a $400,000 check-kiting scheme involving First Interstate Bank of Arizona.

Mr. King wanted Merrill to contact First Interstate to arrange an agreement that would preclude criminal prosecution.

Merrill contacted Dan Durrant, a lawyer he knew at the firm that served as outside counsel for First Interstate. Mr. Durrant was aware that Merrill was suspended. During their meeting, held on June 24, 1996, Mr. Durrant called in James LeValley of First Interstate's legal staff. Mr. Durrant and Merrill differ in their recollection of whether Merrill told Mr. LeValley at that time that he was suspended; Merrill believes he did not mention that fact, while Mr. Durant strongly believes he did.

Mr. LaValley referred the matter to Dan Bergin, another of the bank's legal staff. Mr. Bergin has testified that when he was brought into the case, he was given to understand that Merrill was King's attorney. Upon learning the amount of money involved, however, Mr. Bergin handed the matter over to First Interstate's other outside counsel, James Ball.

Mr. Ball testified that when he was initially contacted

about the situation he was unaware of Merrill's suspension. When Mr. Ball became aware of Merrill's suspension a few days later, he expressed his discomfort with the appearance that he was facilitating Merrill's unauthorized practice of law. Mr. Ball did not concede that he dealt directly with Mr. King, rather than Merrill, at their meeting, and that, although he was present, Merrill did not actively participate.

Mr. Ball eventually discovered he had a conflict of interest in the matter, and the case was refered to new counsel, who brought the matter to a satisfactory resolution

Count Two of the complaint concerns the retention of a new client by Merrill's office while he was suspended.

I 1992, Merrill had hired Robert Silvert as a paralegal. Mr. Silvert had three years of law school and work experience in the legal field. When hired, Mr. Silvert was in the middle of seven years' probation as a result of a 1990 conviction of one felony count of fraudulent schemes. Merrill initially supervised Mr. Silvert closely, but later relaxed that supervision. He

testified that he never gave him full case responsibility for any matter.

On June 4, 1994, Jerry Klock was arrested in Arizona on a fugitive from justice warrant from the State of Nevada on an underlying drug charge. He contacted Merrill's office to resolve the matter, upon a referral by a bail bondsman friend of Mr. Silvert. Mr. Silvert handled the initial meeting with Mr. Klock and accepted his retainer. Mr. Klock never met Mr. Merrill.

Mr. Silvert telephoned Scott Mitchell, and assistant district attorney in Clark County, Nevada, and informed him he was from the law office of Fred Merrill. He did not identify himself as either a paralegal or a lawyer. Mr. Mitchell assumed Mr. Silvert was a lawyer and described the plea agreement he would accept.

Mr. Silvert the contacted Robert Pancoast, a Las Vegas lawyer, to represent Mr. Klock at the Nevada hearing. Again, Mr. Silvert identified himself only as "Robert Silvet of the law

office of Fred Merrill." After discussing his fee, Mr. Pancoast agreed to the representation, and the matter was resolved as Mr. Mitchell had agreed.

Both Mr. Mitchell and Mr. Pancoast testified that they assumed that Mr. Silvert was a lawyer, and that they would not have said or done what they did had they known he was not a licensed attorney.

Both Merrill and Mr. Kennedy testified that they had admonished Mr. Silvert on numerous occasions about identifying himself as a paralegal, although neither did so in connection with the Klock matter.

Count Three also concerns the retention of a new client by Merrill's office while he was suspended.

Prior to Merrill's suspension, Peter Marella had contacted Mr. Silvert for representation in a DUI matter. Mr. Silvert met with Mr. Marella and his wife in July 1994 and accepted a retainer of $1,000 to $1,500 on behalf of Merrill's firm. Both Mr. Kennedy and Ms. Brrigham became involved

in representation of Mr. Marella, with Mr. Kennedy filing a notice of appearance in the case on Merrill's letterhead pleading paper. Although he does not specifically recall the case, Mr. Kennedy assumes he met with the client. After he was reinstated, Merrill became involved in the representation.

The Marellas claim they were never informed of Merrill's suspension, and no other witness could specifically recall whether the Marellas were sent a letter or otherwise informed of the suspension.

The Hearing Committee found that the remaining allegations in the Marella matter rest on the credibility of various witnesses. As it was unable to reach any conclusions concerning credibility, it made no further findings in this Court.

Discussion of Decision

The Hearing Committee found that Merrill's conduct was in violation of Rule 63(a), (b), and (c), and the Commission agrees. The following are the pertinent subsections of Rule 63:

(a) Recipients of Notice; Contents. Within ten days after the date of the commission or court order by judgment imposing discipline . . ., a respondent suspended . . . shall notify or cause the following persons to be notified by registered or certified mail, return receipt requested, of the order or judgment, and of the fact that the lawyer is disqualified to act as lawyer after the effective date of same:

1. All clients being represented in pending matters; and

2. Any co-counsel in pending matters; and

3. Any opposing counsel in pending matters, or in absence of such counsel, the adverse parties; and

4. Each court and division in which respondent has nay pending matter, whether active or inactive.

The notice to be given to opposing counsel or parties shall state the place of residence of the client of respondent. In the event the client does not obtain substitute counsel before the effective date of the . . . suspension . . .. is shall be the responsibility of the . . . suspended . . . lawyer to move in the

court or agency in which the proceeding is pending for leave to withdraw.

(b) Return of Client Property. Respondent shall deliver to all clients being represented in pending matters any papers or other property which they are entitled and shall notify them, and any counsel representing them, of a suitable time and place where the papers and other property may be obtained, calling attention to any urgency for obtaining the papers or other property. Respondent shall deliver all files and records in pending matters to the client, notwithstanding any claim of an attorney lien.

(c) Effective Date of Order; Winding Up Affairs. Judgments imposing suspension or disbarment shall be effective thirty days after entry, unless the court specifies an earlier date. . . . Respondent, after entry of a judgment of disbarment or suspension, shall not accept any new retainer or engage as lawyer for another in any new case or legal matter of any nature. During the period between entry and the effective

date respondent may wind up and complete on behalf of any client all matters that were pending on the entry date. Respondent shall refund any part of any fees paid in advance which have not been earned.

(d) Affidavit Filed With Commission and Court. Within ten days after the effective date of the judgment of disbarment or suspension . . ., respondent shall file with the commission and with the court an affidavit showing:

1. He has fully complied with the provision of the order and with these rules;

2. All other state, federal and administrative jurisdictions in which he is admitted to practice;

3. His residence and all other addresses where communications may thereafter be directed to him; and that

4. He has served a copy of such affidavit upon bar counsel.

Failure to comply with the provisions of this Rule may

be punishable by contempt.

Merrill contends that the judgment and order imposing the ninety-day suspension made reference only to subsections (a) and (D) of Rule 63; therefore, he had no knowledge that the was required to comply with the entirety of Rule 63. The majority of the Commission rejects this argument. Regardless or which subsections were included in the Court's order, Merrill had a clear obligation to comply with all of Rule 63. In fact, Rule 63(d), which the Court did include in its order, provides that a suspended attorney must file an affidavit showing that he has fully complied with the provisions of the order *and with these rules*. Merrill's contention that he believed he was only obligated to comply with certain portions of the Rule is not reasonable.

Merrill has testified without dispute that he notified all existing clients of his suspension by letter, and that all of his clients expressed their wish that he continue his representation upon reinstatement. The Committee accepted this testimony,

but found that there was no substitution of counsel in Merrill's cases during the period of suspension and that he did not move to withdraw from the cases. Neither did he return client files, records, or property to clients; he retained those files and records at his office and retained unearned fees in his trust and general operating accounts.

The crux of this matter is whether Merrill's actions during his suspension were appropriate. Rule 31(a)(3) provides, kn part, that "no member shall practice law in this state or hold himself out as one who may practice law in this state, while suspended." However, exactly what constitutes the practice of law, and just what a suspended or disbarred lawyer can or cannot do, is not provided in the Rules. Rule 63 provides some direction, but certainly does not address the issue of what constitutes the practice of law.

The Committee and the Commission struggled with Merrill's intent in the subject misconduct. Merrill asserts he was merely trying to do the right things—complying with the

portions of Rule 63 referenced in the court's order of suspension, hiring lawyers to handle his cases while he was on suspension, etc. Despite such assertions of good will, while suspended, Merrill kept in his employ a paralegal who had a history of implying he was a lawyer; he allowed his firm, even his paralegal, to continue to accept new clients and their retainers; he continued to supervise his non-lawyer legal staff; and he continued to be the sole signatory on his trust account and general operating bank account and he signed and issued checks on those accounts. In addition, there was no outward indication that Merrill was on suspension (for example, his office sent out pleadings and correspondence on the letterhead of "The Law Office of Frederick D. Merrill" or "Frederick D. Merrill, P.C.," his business cards continued to be displayed on the reception desk, telephones were answered "Law Office of Fred Merrill,"[2] and the sign on the building directory continued

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[2]At oral argument, Merrill stated the phones were answered only "Law Offices."

to read "The Law Office of Frederick D. Merrill"). While the Rules may not specifically dictate what acts constitute the practice of law, it seems clear that such actions and circumstances are basic to the practice of law, and are inappropriate during a period of suspension.

Merrill admits that he did not seek the guidance of the State Bar and did not seek an ethics opinion from the Committee on Rules of Professional Conduct in deciding what conduct would be acceptable for a suspended attorney.[3] The State Bar admits that it does not have specific guidelines as to what a suspended lawyer can, or cannot, do. As the Committee notes, the Rules Committee might well have declined such an inquiry as presenting a question of law rather than ethics. Further, the Court has not as yet had occasion to provide a clear definition of the effects of a suspension from practice. Thus,

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[3]He did seek the advice of his counsel in the former disciplinary proceedings, who advised him to retain other attorneys to handle this case. Merrill followed this advice.

had Merrill sought guidance, it is possible he still would not have received clear parameters within which to work.

The Commission, like all the parties to this proceeding, are troubled by the lack of clear direction in such circumstances. The Commission finds Rule 63 to be instructive on this issue as far as it currently goes; however, it would prefer to see the rule contain more all-encompassing and specific guidelines as to the appropriate conduct for a lawyer who is barred from practicing law.

Despite the apparent lack of a definition of the "practice of law," the Commission has concluded that, at the very least, Merrill's conduct clearly violated Rule 63(a), (b), and (c). The Commission reviewed the American Bar Association's *Standards for Imposing Lawyer Sanctions* for guidance on the appropriate sanction for such a violation. Standard 3.0, providing general factors that should be considered in fashioning the sanction warranted, lists (a) the duty violated, (b) the lawyer's mental state, (c) the potential or actual injury

caused by the lawyer's misconduct, and (d) the existence of aggravating or mitigating factors. The Commission finds that Merrill's conduct violated his duty as a professional,[4] that his conduct was intentional, and that the resulting injury could have been serious— particularly had the other parties to the cases handled by Mr. Silvert withdrawn their agreements after learning he was not an attorney.

Standard 7.2, therefore, addressing Violations of Duties Owed as Professional, is the appropriate Standard to consider in relation to Merrill's conduct. Specifically, Standard 7.2 provides for suspension when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and

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[4]While it might appear that a violation of Rule 63 breaches a lawyer's duty to his clients, the Theoretical Framework to the *Standards* indicates that the duties lawyers have to their clients are loyalty, diligence, competence, and candor. These are not the issues raised by a violation of Rule 63. Rather, the *Standards* indicate that practicing law while suspended is a violation of the lawyer's duty as a professional, although it could obviously result in harm to a "client."

causes injury or potential injury to a client, the public. or the legal system. Merrill's conduct violated his duty as a professional to uphold the orders and rules that regulate the legal profession.

Finally, the Commission considered the applicable aggravating and mitigating factors, which it finds to be of equal weight. In aggravation are prior disciplinary offenses (in addition to the prior suspension, Merrill was previously informally reprimanded in 1992 for unrelated conduct), a selfish motive, and substantial experience in the practice of law. In mitigation are full and free disclosure during the disciplinary proceedings, and remorse; Merrill has admitted, in hindsight, that he should have done things differently, although he could not articulate what alternate actions he might have taken.

Continuing to practice law in any form while suspended is, of course, serious conduct. Two prior cases addressing this issue are *In re Tarletz, 165* Ariz. 243, 798 P.2d 381 (1991), and *In re Phelps, 154* Ariz. 516, 744 P.2d 428 (987), both of which

indicate that practicing law while suspended after a previous finding of unprofessional conduct warrants disbarment. However, in both of those cases the respondents were clearly involved in the unauthorized practice of law, and each had significant prior discipline. Such is not the case here. As discussed throughout these proceedings, there is at this point no clear guideline in this state to indicate just what qualifies as "practicing law." Thus, there has been no finding that Merrill was involved in the unauthorized practice of law. The only conclusion that the Commission can reach in this matter is that Merrill violated his obligations under Rule 63. It found no prior cases addressing this particular violation, however.

Thus, in seeking guidance for the appropriate sanction in this matter, the Commission turned to consideration of the purpose of lawyer discipline, which is to protect the public and the profession, rather than to punish the offender. *In re Kersing*, 151 Ariz. 171, 726 P.2d 249 (1982). The sanction imposed should, be however, deter the respondent and other

attorneys from engaging similar unethical conduct. *In re Kliendienst,* 132 Ariz. 95, 644 P.2d 249 (1982). As discussed at length, there can be no conclusive finding of the unauthorized practice of law in this matter. Thus, disbarment would be inappropriate and border on punitive. However, Merrill's clear violation of a court order and court rule is, in itself, serious conduct warranting a suspension.

Merrill's explanations for his conduct during his suspension are inadequate and unconvincing, and both the Commission and Committee find that his conduct was done knowingly. Based on these findings, the majority of the Commission believes a one-year suspension is warranted, as it believes it appropriate to require that Merrill prove rehabilitation before being reinstated.[5] The majority of the Commission also recommends, like the Committee, that

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[5]Rule 71(h), Ariz.R.S.Ct., requires lawyers who have been suspended for more than six months to demonstrate proof of rehabilitation in reinstatement proceedings.

Merrill's compliance with Rule 63, in connection with this suspension, be monitored by LOMAP personnel, as detailed above.

RESPECTFULLY SUBMITTED this 13th day of February, 1997.

/s/
Richard N. Goldsmith, Chair
Disciplinary Commission

Copies of the foregoing were mailed this 14th day of February, 1997 to:

Fredrick D. Merrill, Respondent
100 W. Clarendon, Suite 650
Phoenix, Arizona 85013-3527

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Hearing Committee 6D
Two North Central, Suite 2200
Phoenix, Arizona 85004-2390

Stephen M. Kemp, Member
Hearing Committee 6D
8401 West Monroe, Room 340
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Brian R. Warnock, Alternate Member
Hearing Committee 6D
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Phoenix, Arizona 85016-4214

Copies of the foregoing were hand-delivered this 14th day of February, 1997, to:

Yigael M. Cohen, Bar Counsel
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Phoenix, Arizona 85003-1742

KENDRA A. DIEGAN
Disciplinary Clerk

By: /s/

Appendix C

SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA,	)	Supreme Court No. SB-94-0028-D
	)	No. 92-0485
FREDRICK D. MERRILL, Respondent.	)	JUDGMENT AND ORDER

This matter having come on for hearing before the Disciplinary Commission of the Supreme Court of Arizona, it having duly rendered its decision and no timely appeal therefrom having been filed, and the Court having declined sua sponte review,

IT IS ORDERED, ADJUDGED AND DECREED that FREDRICK D. MERRILL, a member of the State Bar of Arizona, is hereby suspended fro the practice of law for a period of ninety days for conduct in violation of his duties and obligations as a lawyer, as disclosed in the commission report attached hereto as Exhibit A.

IT IS FURTHER ORDERED that FREDRICK D. MERRILL shall seek assistance from the State Bar's Law Office Management Assistance Program, follow any recommendations issued by the director of LOMAP, pay all costs and expenses incurred in connection with his referral to LOMAP, and, within one year of reinstatement, take twelve additional hours of continuing legal education, in addition to his requirement under MCLE, to be divided equally between law office management and trust and estate law.

IT IS FURTHER ORDERED that pursuant to Rule 63(a), Rules of the Supreme Court of Arizona, FREDRICK D. MERRILL shall notify all of his clients, within ten (10) days fro the date hereof, of his inability to continue to represent them and that they should promptly retain new counsel, and shall promptly inform this court of his compliance with this Order as provided by Rule 63(d), Rules of the Supreme Court of Arizona.

IT IS FURTHER ORDERED that FREDRICK D.

MERRILL shall pay the costs of these proceedings in the amount of $833.90.

DATED this 24th day of May, 1994.

/s/
NOEL K. DESSAINT
Clerk of the Court

Page 1 of 2

TO:
Fredrick D. Merrill, Respondent (Certified Mail, Return Receipt)
Mark I. Harrison, Counsel for Respondent
Yigael M. Cohen, State Bar Counsel
Harriet L. Turney, Chief Bar Counsel, State Bar of Arizona
Rosemary B. Martin, Clerk, Disciplinary Commission (Cert. Copy)
Shirley Murray, Membership Records (Cert. Copy)
Bruce Hamilton, Executive Director, State Bar of Arizona
Clerk, United States District Court, District of Arizona (Cert. Copy)
Clerk, United States Court of Appeals, Ninth Circuit (Cert. Copy)
Clerk, United States Supreme Court (Cert. Copy)
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Appendix D

SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA,	)	Supreme Court No. SB 97-0044-D
FREDERICK D. MERRILL, Attorney No. 005916	)	Nos. 94-1394, 95-0235 & 95-0370
RESPONDENT.	)	JUDGMENT AND ORDER

This matter having come on for hearing before the Disciplinary Commission of the Supreme Court of Arizona, it having duly rendered its decision and having denied the petition for review filed by FREDERICK D. MERRILL,

IT IS ORDERED, ADJUDGED AND DECREED that FREDERICK D. MERRILL, a member of the State Bar of Arizona, is hereby suspended from the practice of law for a period of one year effective thirty (30) days from the date of this Judgment and Order, for conduct in violation of his duties and obligations as a lawyer, as disclosed in the commission report attached hereto as Exhibit A.

IT IS FURTHER ORDERED that not later than ten days prior to the effective date of this suspension, the director of the Law Office Management Assistance Program ("LOMAP") or her designee shall personally meet with FREDERICK D. MERRILL to ensure that he has complied, will comply, and has

put in place procedures to ensure his compliance with Supreme Court Rule 63 in all respects. If he has not, the State Bar shall consider appointment of a conservator under Supreme Court Rule 65(a).

IT IS FURTHER ORDERED that, if FREDERICK D. MERRILL applies for reinstatement, the same person or another designated by the director of LOMAP shall review his activities and actions during the period of suspension to determine whether he complied with Rule 63, and shall file a report with the State Bar to be considered along with the other matters required by Supreme Court Rules 71 and 72.

IT IS FURTHER ORDERED that any and all costs associated with these provisions shall be borne by FREDERICK D. MERRILL.

IT IS FURTHER ORDERED that FREDERICK D. MERRILL shall comply with all the provisions of Rule 63, Rules of the Supreme Court of Arizona, including, but not limited to, Rule 63(a), which requires that respondent notify all of his clients, within ten (10) days from the date hereof, of his inability to continue to represent the and that they should promptly retain new counsel. FREDERICK D. MERRILL shall promptly inform this court of his compliance with this Order as provided in Rule 63(d).

IT IS FURTHER ORDERED that FREDERICK D. MERRILL shall pay the costs and expenses of these proceedings in the amount of $3,150.36, together with interest at the legal rate from the date of this judgment.

DATED this 30th day of October, 1998.

/s/
THOMAS A. ZLAKET
Chief Justice

TO:
Frederick D. Merrill, Respondent (Certified Mail, Return Receipt)
Yigael M. Cohen, State Bar Counsel
Chief Bar Counsel, State Bar of Arizona
Kendra A. Diegan, Clerk, Disciplinary Commission (Cert. Copy)
Shirley Murray, Membership Records (Cert. Copy)
Stuart A. Forsyth, Executive Director, State Bar of Arizona
Clerk, United States District Court, District of Arizona (Cert. Copy)
Clerk, United Court of Appeals, Ninth Circuit (Cert. Copy)
Clerk, United States Supreme Court (Cert. Copy)
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/cjq

RULE 63. NOTICE TO CLIENTS, ADVERSE PARTIES AND OTHER COUNSEL

(a) Recipients of Notice; Contents. Within ten days after the date of the commission or court order or judgment imposing discipline or transfer to disability inactive status, or the date of resignation, a respondent suspended, disbarred transferred or disability inactive status, or who has resigned, shall notify or cause the following persons to be notified by registered or certified mail, return receipt requested of the order or judgment, and of the fact that the lawyer is disqualified to act as lawyer after the effective date of same:

1. All clients being represented in pending matters; and

2. Any co-counsel in pending matters; and

3. Any opposing counsel in pending matters, or in the absence of such counsel, the adverse parties; and

4. Each court and division in which respondent has any pending matter, whether active or inactive.

The notice to be given to opposing counsel or parties shall state the place of residence of the client of respondent. In the event the client does not obtain substitute counsel before the effective date of the disbarment, suspension, transfer or resignation, it shall be the responsibility of the disbarred, suspended, transferred or resigned lawyer to move in the court of agency in which the proceeding is pending for leave to withdraw.

Source:

Generally: ABA 1977 Rule 19.

Last sentence: former Rule 37(h)(2)(b).

(b) Return of Client Property. Respondent shall deliver to all clients being represented in pending matters any papers or other property to which they are entitled and shall notify them, and any counsel representing them, of a suitable time and place where the papers and other property may be obtained, calling attention to any urgency for obtaining the

papers or other property. Respondent shall deliver all files and records in pending matters to the client, notwithstanding any claim of an attorney lien.

Source:

Generally: ABA 1977 Rule 19.

(c) Effective Date of Order; Winding Up Affairs. Judgment imposing suspension or disbarment shall be effective thirty days after entry, unless the court specifies an earlier date. Judgments and orders imposing other sanctions or transfer to disability inactive status are effective immediately upon entry. Respondent, after entry of a judgment of disbarment or suspension, shall not accept any new retainer or engage as lawyer for another in any new case or legal matter of any nature. During the period between entry and the effective date respondent ma wind up and complete on behalf of any client all matters that were pending on the entry date. Respondent shall refund any part of any fees paid in advance which have not been earned.

Source:

Generally: ABA 1977 Rule 19.

(d) Affidavit Filed With Commission and Court. Within ten days after the effective date of the judgment of disbarment or suspension, or an order transferring him to disability inactive status, or his resignation, respondent shall file with the commission and with the court an affidavit showing:

1. He has fully complied with the provisions of the order and with these rules;

2. All other state, federal and administrative jurisdictions in which he is admitted to practice;

3. His residence and other addresses where communications may thereafter be directed to him; and that

4. He has served a copy of such affidavit upon bar counsel.

Failure to comply with the provisions of this Rule may be punishable by contempt.

(e) Duty to Maintain Records. A disbarred or

suspended lawyer, or lawyer on disability status to the extent he is able, or the conservator shall keep and maintain records of the various steps taken by him under these rules so that, upon any subsequent proceedings instituted by or against the lawyer, proof of compliance with this rule shall be condition precedent to any application for reinstatement.

Source:

Generally: ABA 1977 Rule 19.

Amended April 2, 1986, effective June 1, 1986; January 26, 1994, effective June 1, 1994.

Appendix F

IN THE SUPREME COURT
STATE OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA FRED MERRILL, Respondent.	)	Disciplinary Commission Nos. 94-1394 95-0235 95-0370 RESPONDENT'S BRIEF ON PETITION FOR REVIEW

Fredrick D. Merrill
100 W. Clarendon, Suite 650
Phoenix, AZ 85013-3527

Respondent in Pro Per

[Excerpt of pages 7 and 8 only]

III. THE ETHICAL STANDARDS CONCERNING THE UNAUTHORIZED PRACTICE OF LAW

The Complaint is comprised primarily of allegations concerning the unauthorized practice of law. The Findings and Report reflect considerable confusion as to the definition of the unauthorized practice of law and just what a suspended attorney is barred from doing. The only clear guidance, according to the Commission, is Rule 63, which Mr. Merrill allegedly violated. Yet at the same time, the Commission clearly states that there was no unauthorized practice of law. Therefore, the ethical obligations Mr. Merrill violated might have more to do with the general prohibition of failing to comply with rules and orders. Yet if Mr. Merrill did was not involved in the unauthorized practice of law, how can he be in violation of Rule 63? The Commission was clearly concerned with how Mr. Merrill managed the law office during his suspension and admit that the only guidance he had was Rule 63. (R. at 11)

IV. THE ORDER OF SUSPENSION ALONE DICTATED MERRILL'S ACTIONS

The Order of Suspension directed Mr. Merrill to comply with Rule 63(a) and (d). If the Court had been concerned about placing the full impact of Rule 63 on Mr. Merrill, why did it cite only part of the rule?[1] It is impossible to know for sure but Mr. Merrill suspects that it may have something to do with the short length of the suspension. The mandates of Rule 63 in its entirety fail to recognize the practical impossibilities facing the sole practitioner facing a short-term suspension. If Mr. Merrill was part of a large firm, the 90 day suspension would have had drastically different ramifications. This raises Equal Protection claims that the Commission was unable to answer.

Both the ABA and the Commission are silent as to what a sole practitioner should do in the event of a short-term

---

[1]Merrill presented the Commission a list of 37 cases involving attorney disciplinary orders from 1988 to 1996. Of these, approximately 50% of the cases recited only paragraphs (a) and (d) of Rule 63 while the remainder included "all applicable provisions of Rule 63."

suspension. Mr. Merrill had only the Court Order to guide him. The Committee Chairman was at a loss at knowing from Rule 63 what constitutes the unauthorized practice of law. (Tr. at 75) The Chairman openly questioned the Committee's jurisdiction, yet failed to establish that jurisdiction before rendering judgment on Mr. Merrill. *Id.*

The role of the Chairman is directly analogous to that of a judge. Judges rule on questions of law. Mr. Gaines admitted that he could not answer this rule of law. The Committee should have made no decision. It should have referred it to the Supreme Court, which is the only body that can decide the issue of whether there was a violation of Rule 63.

This Court has not specifically stated what constitutes the unauthorized practice of law. Even in a recent case, the Court held that the lawyer did partake in the unauthorized practice of law during suspension. However, the opinion provided no discussion whatsoever as to what the attorney actually did. *State Bar v. Manning*, 180 Ariz. 45, 881 P.2d 1150

(1994). This Court again declined to discuss the meaning of the unauthorized practice of law in *State Bar of Arizona v. Coburn*, 181 Ariz. 250, 889 P.2d 608 (1995). The Commission is clearly in need of clarification on this issue.

The ABA states in the commentary to Model Rules for Disciplinary Enforcement, Rule 10 (Sanctions), that courts provide a valuable service to the legal profession and the public, when they explain the imposition of specific sanctions. This according to the ABA, educates the legal profession as well as providing precedent. In the present case, the State Bar specifically stated that the Supreme Court would have to explain certain things to them in order to fully decide the issues.

Supreme Court, U. S.
FILED
FEB 24 1998
CLERK

(2)

No. 97-1245

In The

Supreme Court of the United States

October Term, 1997

FREDRICK D. MERRILL,

Petitioner,

v.

STATE BAR OF ARIZONA, an instrumentality of the Arizona Supreme Court,

Respondent.

On Petition For A Writ Of Certiorari To The Arizona Supreme Court

BRIEF IN OPPOSITION

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February 24, 1998

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QUESTION PRESENTED FOR REVIEW

The Supreme Court of Arizona suspended Petitioner for violating Rule 63, Ariz. R.S.Ct. Therefore does the matter before the Court even involve the unauthorized practice of law?

PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding.

Respondent, State Bar of Arizona, is a non-profit corporation, incorporated in the State of Arizona.

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OPINION BELOW

The Petition for Writ of Certiorari accurately reflects the opinions delivered in this case by other tribunals. The report of the Disciplinary Commission is included in the Appendix at 1a-15a.

RULES INVOLVED

Rule 63, Ariz. R.S.Ct. provides in part:

(a) Recipients of Notice; Contents. Within ten days after the date of the commission or court order or judgment imposing discipline or transfer to disability inactive status, or the date of resignation, a respondent suspended, disbarred, transferred to disability inactive status, or who has resigned, shall notify or cause the following persons to be notified by registered or certified mail, return receipt requested, of the order or judgment, and of the fact that the lawyer is disqualified to act as lawyer after the effective date of same:

1. All clients being represented in pending matters; and

2. Any co-counsel in pending matters, and

3. Any opposing counsel in pending matters, or in the absence of such counsel, the adverse parties; and

4. Each court and division in which respondent has any pending matter, whether active or inactive.

The notice to be given to opposing counsel or parties shall state the place of residence of the client of respondent. In the event the client does not obtain substitute counsel before the effective date of the disbarment, suspension, transfer or resignation, it shall be the responsibility of the disbarred, suspended, transferred or resigned lawyer to move in the court or agency in which the proceeding is pending for leave to withdraw.

(b) Return of Client Property. Respondent shall deliver to all clients being represented in pending matters any papers or other property to which they are entitled and shall notify them, and any counsel representing them, of a suitable time and place where the papers and other property may be obtained, calling attention to any urgency for obtaining the papers or other property. Respondent shall deliver all files and records in pending matters to the client, notwithstanding any claim of an attorney lien.

(c) Effective Date of Order: Winding Up Affairs. Judgments imposing suspension or disbarment shall be effective thirty days after entry, unless the court specifies an earlier date. Judgments and orders imposing other sanctions or transfer to disability inactive status are effective immediately upon entry. Respondent, after entry of a judgment of disbarment or suspension, shall not accept any new retainer or engage as lawyer for another in any new case or legal matter on any nature. During the period between entry and the effective date respondent may wind up and complete on behalf of any client all matters that were pending on the entry date. Respondent shall

refund any part of any fees paid in advance, which have not been earned.

STATEMENT

The State Bar hereby incorporates the facts recited in the Report of the Disciplinary Commission as set forth in the appendix at 2a-6a.

With regard to Petitioner's Statement, the State Bar disputes certain of the factual recitations as incomplete or inaccurate. Specifically, while Petitioner may have complied with the order suspending him (Petition at 3), he did not comply with Rule 63, Ariz. R.S.Ct., which governs the conduct of lawyers who have been suspended or disbarred. During Petitioner's period of suspension, there were no substitutions of counsel in his cases and he did not move to withdraw from those cases. Neither did Petitioner return client files, records, or property to clients; he retained those files and records at his office and retained unearned fees in his trust and general operating accounts. In addition, he accepted new clients during this same period. The Disciplinary Commission found that all of the above referenced conduct violated Rule 63, Ariz. R.S.Ct.

Petitioner also misstates the record in stating that after he was reinstated from his prior suspension, he was again charged by the "bar's disciplinary committee" with practicing law during his three-month suspension. Petition at 4. First, the Office of Bar Counsel, not a "disciplinary committee", filed the charging document or complaint. Second, and more important, while the

unauthorized practice of law was an element of the complaint it was not the only element. Petitioner was also charged with violating Rule 63. Appendix at 16a-20a.

Petitioner also misstates the record by asserting that the State Bar had to amend its complaint to allege a violation of Rule 63, Ariz. R.S.Ct. Petition at 5. The complaint consisted of four separate counts. Counts One and Three alleged violations of Rule 63. Only Count Two had to be amended during the hearing. Contrary to Petitioner's assertions, the disciplinary proceeding was not initiated solely because of his "allegedly unauthorized practice of law."

Finally, Petitioner incorrectly states that rule 63 prohibited a suspended lawyer from practicing law. Petition at 6. In point of fact, the rule contains no language, which specifically addresses the practice of law.

REASONS FOR DENYING THE PETITION

It has long been held in Arizona that the "purpose of discipline is to protect the public, the profession and the justice system." *In re Neville*, 147 Ariz. 106, 708 P.2d 1297 (1985). The United States Supreme Court has also noted that the states have a strong interest in "assuring and maintaining high standards of conduct of attorneys engaged in practice." *Middlesex County Ethics Committee v. Garden State Bar Association et al.*, 457 U.S. 423, 435, 102 S.Ct. 2515, 2522, 73 L.Ed. 2d 116 (1982). Thus even accepting Petitioner's argument that he was denied equal protection, the state had a rational basis for doing so.

Petitioner asserts that he was denied equal protection of the law because he was suspended for engaging in the unauthorized practice of law. Petition at 8-9. Petitioner's entire premise is faulty because he was not suspended for practicing law while under suspension. In fact the Disciplinary Commission specifically did not find a violation of the rules relating to the unauthorized practice of law. Appendix at 13a. Rather, the Disciplinary Commission held that Petitioner repeatedly violated Rule 63, Ariz. R.S.Ct.

Specifically, the Disciplinary Commission found that Petitioner, during his suspension failed to file substitutions of counsel and that he did not move to withdraw from his cases. The Disciplinary Commission further found that he did not return client files, records, or property to clients and that he retained those files and records at his office and retained unearned fees in his trust and general operating accounts. While all of the aforementioned conduct violated Rule 63, none of it constituted the unauthorized practice of law.

The only violative conduct engaged in by the Petitioner that arguably could constitute the unauthorized practice of law was his acceptance of new clients during his period of suspension. This conduct expressly violated Rule 63(c), Ariz. R.S.Ct. The Disciplinary Commission however did not find a violation of the rules relating to the unauthorized practice of law.

Even assuming *arguendo* that Petitioner was sanctioned for engaging in the unauthorized practice of law,

his arguments are flawed. Petitioner presumes that simply because Arizona does not have an unauthorized practice of law statute, all citizens are allowed to engage in the unauthorized practice of law. Petitioner however has failed to cite to this Court, Rule 31(a)(3), Ariz. R.S.Ct. This rule states that:

> Except as hereinafter provided in subsection 4 of this section (a), no person shall practice law in this state unless he is an active member of the State Bar, and no member shall practice law in this state or hold himself out as one who may practice law in this state, while suspended, disbarred, or on disability inactive status.

In Arizona, the practice of law is defined by the Supreme Court of Arizona's holding in *State Bar of Arizona v. Arizona Land Title & Trust Co.*, 90 Ariz. 76, 366 P.2d 1 (1961), *modified on other grounds*, 91 Ariz. 293, 371 P.2d 1020 (1962). The court held that:

> [T]hose acts, whether performed in court or in the law office, which lawyers have carried on from day to day through the centuries constitute the practice of law. Such acts include, but are not limited to, one person assisting or advising another in the preparation of documents or writings which affect alter or define legal rights; the direct or indirect giving of advice relative to legal rights or liabilities, the preparation for another of matters for courts, administrative agencies and other judicial or quasi-judicial bodies and officials as well as the acts of representation of another before such a body or officer. They also include rendering to another any other advice or services which are and have been customarily given and performed from day

> to day in the ordinary practice of members of the legal profession, either with or without compensation.

Id. at 95.

It appears that Petitioner would have this Court believe that Arizona is the land of the wild west, where anybody can hold themselves out as a lawyer and engage in the practice of law. As previously stated, just because there is no state statute relating to the unauthorized practice of law, does not mean that the common citizens of Arizona can engage in the practice of law. Petitioner has provided absolutely no support for his assertion that he was sanctioned for something that non-lawyers can do. In addition he has failed to take into account rule 31(a)(3), Ariz. R.S.Ct.

CONCLUSION

For all the foregoing reasons, the State Bar of Arizona respectfully urges the Court to deny the petition for Writ of Certiorari.

Respectfully submitted,

YIGAEL M. COHEN
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APPENDIX A

BEFORE THE DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ARIZONA

In the Matter of **FREDERICK D. MERRILL,** Attorney No. 005916 a Member of the State Bar of Arizona, RESPONDENT.	Comm. Nos. 94-1394, 95-0235 & 95-0370 **DISCIPLINARY COMMISSION REPORT**

(Filed Feb. 13, 1997)

This matter came before the Disciplinary Commission of the Supreme Court of Arizona on December 14, 1996, for oral argument on the Hearing Committee's recommendation of suspension and probationary terms, pursuant to Rule 53(d), Ariz.R.S.Ct. The respondent, Fredrick D. Merrill ("Merrill"), filed an objection to the Hearing Committee's recommendation.

Decision

With five members concurring and three members dissenting,[1] the Commission adopts the findings of fact, conclusions of law, and recommendation of the Hearing Committee that:

---

[1] Commissioner Ortega did not participate in these proceedings. Commissioners Malm, Bonwell, and Potts dissent, in the belief that a shorter suspension is warranted.

1. Merrill shall be suspended for a period of one year;

2. Not later than ten days prior to the effective date of the suspension, the director of the Law Office Management Assistance Program ("LOMAP") or her designee shall personally meet with Merrill to ensure that he has complied, will comply, and has put in place procedures to ensure his compliance with Supreme Court Rule 63 in all respects. If he has not, the State Bar shall consider appointment of a conservator under Supreme Court rule 65(a):

3. If Merrill applies for reinstatement, the same person or another designated by the director of LOMAP shall review Merrill's activities and actions during the period of suspension to determine whether Merrill complied with Rule 63, and shall file a report with the State Bar to be considered along with the other matters required by Supreme Court Rules 71 and 72; and

4. Any and all costs associated with these recommendations shall be borne by Merrill.

Facts

Merrill was admitted to the State Bar of Arizona on October 13, 1979. He was suspended from the practice of law for a period of ninety days by court order dated May 24, 1994. That suspension became effective on June 24, 1994.

Prior to his suspension, Merrill was a sole practitioner at "The Law Office of Fredrick D. Merrill." While suspended, Merrill continued to maintain his office,

receive mail, and occasionally meet with clients. He signed no pleadings and filled all of his time at paralegal rates.

He contracted with two lawyers to perform services for his clients during his suspension; Tara Brigham, a newly-admitted lawyer, and David Kennedy, an experienced practitioner. Merrill paid them by the hour to meet with clients, sign pleadings, and make court appearances. They did not work out of Merrill's office, and had no supervisory responsibilities over his staff, which consisted of three non-lawyers. Pleadings were prepared by Merrill's employees and submitted to Ms. Brigham and Mr. Kennedy for review and signature. The pleadings were on the letterhead of "Fredrick D. Merrill, P.C.," and Ms. Brigham's and Mr. Kennedy's signature followed the work "by."

The complaint in this matter arises out of his office's involvement in three cases during his period of suspension.

Count One involves Merrill continuing to act in a limited role for a client following his suspension. Shortly before Merrill's suspension began, his client, Jack King, confessed to him that he had been involved in a $400,000 check-kiting scheme involving First Interstate Bank of Arizona. Mr. King wanted Merrill to contact First Interstate to arrange an agreement that would preclude criminal prosecution.

Merrill contacted Dan Durrant, a lawyer he knew at the firm that served as outside counsel for First Interstate. Mr. Durrant was aware that Merrill was suspended. During their meeting, held on June 24, 1996, Mr. Durrant

called in James LeValley of First Interstate's legal staff. Mr. Durrant and Merrill differ in their recollection of whether Merrill told Mr. LeValley at that time that he was suspended; Merrill believes he did not mention that fact, while Mr. Durrant strongly believes he did.

Mr. LeValley referred the matter to Dan Bergin, another of the bank's legal staff. Mr. Bergin has testified that when he was brought into the case, he was given to understand that Merrill was Mr. King's attorney. Upon learning the amount of money involved, however, Mr. Bergin handed the matter over to First Interstate's other outside counsel, James Ball.

Mr. Ball testified that when he was initially contacted about the situation he was unaware of Merrill's suspension. When Mr. Ball became aware of Merrill's suspension a few days later, he expressed his discomfort with the appearance that he was facilitating Merrill's unauthorized practice of law. Mr. Ball did concede that he dealt directly with Mr. King, rather than Merrill, at their meeting, and that, although he was present, Merrill did not actively participate.

Mr. Ball eventually discovered he had a conflict of interest in the matter, and the case was referred to new counsel, who brought the matter to a satisfactory resolution.

Count Two of the complaint concerns the retention of a new client by Merrill's office while he was suspended.

In 1992, Merrill had hired Robert Silvert as a paralegal. Mr. Silvert had three years of law school and work experience in the legal field. When hired, Mr. Silvert was

in the middle of seven years' probation as a result of a 1990 conviction of one felony count of fraudulent schemes. Merrill initially supervised Mr. Silvert closely, but later relaxed that supervision. He testified that he never gave him full case responsibility for any matter.

On June 4, 1994, Jerry Klock was arrested in Arizona on a fugitive from justice warrant from the State of Nevada on an underlying drug charge. He contacted Merrill's office to resolve the matter, upon a referral by a bail bondsman friend of Mr. Silvert. Mr. Silvert handled the initial meeting with Mr. Klock and accepted his retainer. Mr. Klock never met Merrill.

Mr. Silvert telephones Scott Mitchell, an assistant district attorney in Clark County, Nevada, and informed him he was from the law office of Fred Merrill. He did not identify himself as either a paralegal or a lawyer. Mr. Mitchell assumed Mr. Silvert was a lawyer and described the plea agreement he would accept.

Mr. Silvert then contacted Robert Pancoast, a Las Vegas lawyer, to represent Mr. Klock at the Nevada hearing. Again, Mr. Silvert identified himself only as "Robert Silvert of the law office of Fred Merrill." After discussing his fee, Mr. Pancoast agreed to the representation, and the matter was resolved as Mr. Mitchell had agreed.

Both Mr. Mitchell and Mr. Pancoast testified that they assumed that Mr. Silvert was a lawyer, and that they would not have said or done what they did had they known he was not a licensed attorney.

Both Merrill and Mr. Kennedy testified that they had admonished Mr. Silvert on numerous occasions about

identifying himself as a paralegal, although neither did so in connection with the Klock matter.

Count Three also concerns the retention of a new client by Merrill's office while he was suspended.

Prior to Merrill's suspension, Peter Marella had contacted Mr. Silvert for representation in a DUI matter. Mr. Silvert met with Mr. Marella and his wife in July 1994 and accepted a retainer of $1,000 to $1,500 on behalf of Merrill's firm. Both Mr. Kennedy and Ms. Brigham became involved in representation of Mr. Marella, with Mr. Kennedy filing a notice of appearance in the case on Merrill's letterhead pleading paper. Although he does not specifically recall the case, Mr. Kennedy assumes he met with the client. After he was reinstated, Merrill became involved in the representation.

The Marellas claim they were never informed of Merrill's suspension, and no other witness could specifically recall whether the Marellas were sent a letter or otherwise informed of the suspension.

The Hearing Committee found that the remaining allegations in the Marella matter rest on the credibility of various witnesses. As it was unable to reach any conclusions concerning credibility, it made no further findings in this Court.

Discussion of Decision

The Hearing Committee found that Merrill's conduct was in violation of Rule 63(a), (b), and (c), and the Commission agrees. The following are the pertinent subsections of Rule 63:

(a) Recipients of Notice; Contents. Within ten days after the date of the commission or court order or judgment imposing discipline . . . , a respondent suspended . . . shall notify or cause the following persons to be notified by registered or certified mail, return receipt requested, of the order or judgment, and of the fact that the lawyer is disqualified to act as lawyer after the effective date of same:

1. All clients being represented in pending matters; and

2. Any co-counsel in pending matters; and

3. Any opposing counsel in pending matters, or in the absence of such counsel, the adverse parties; and

4. Each court and division in which respondent has any pending matter, whether active or inactive.

The notice to be given to opposing counsel or parties shall state the place of residence of the client of respondent. In the event the client does not obtain substitute counsel before the effective date of the . . . suspension . . . , it shall be the responsibility of the . . . suspended . . . lawyer to move in the court or agency in which the proceeding is pending for leave to withdraw.

(b) Return of Client Property. Respondent shall deliver to all clients being represented in pending matters any papers or other property to which they are entitled and shall notify them, and any counsel representing them, of a suitable time and place where the papers and other property may be obtained, calling attention to any urgency for obtaining the papers or other property. Respondent shall deliver all files and

records in pending matters to the client, notwithstanding any claim of an attorney lien.

(c) Effective Date of Order; Winding Up Affairs. Judgments imposing suspension or disbarment shall be effective thirty days after entry, unless the court specifies an earlier date. . . . Respondent, after entry of a judgment of disbarment or suspension, shall not accept any new retainer or engage as lawyer for another in any new case or legal matter of any nature. During the period between entry and the effective date respondent may wind up and complete on behalf of any client all matters that were pending on the entry date. Respondent shall refund any part of any fees paid in advance which have not been earned.

(d) Affidavit Filed With Commission and Court. Within ten days after the effective date of the judgment of disbarment or suspension . . . , respondent shall file with the commission and with the court an affidavit showing:

1. He has fully complied with the provisions of the order and with these rules;

2. All other state, federal and administrative jurisdictions in which he is admitted to practice;

3. His residence and other addresses where communications may thereafter be directed to him; and that

4. He has served a copy of such affidavit upon bar counsel.

Failure to comply with the provisions of this Rule may be punishable by contempt.

Merrill contends that the judgment and order imposing the ninety-day suspension made reference only to subsections (a) and (d) of Rule 63; therefore, he had no knowledge that he was required to comply with the entirety of Rule 63. The majority of the Commission rejects this argument. Regardless of which subsections were included in the Court's order, Merrill had a clear obligation to comply with all of Rule 63. In fact, Rule 63(d), which the Court did include in its order, provides that a suspended attorney must file an affidavit showing that he has fully complied with the provisions of the order *and with these rules.* Merrill's contention that he believed he was only obligated to comply with certain portions of the Rule is not reasonable.

Merrill has testified without dispute that he notified all existing clients of his suspension by letter, and that all of his clients expressed their wish that he continue his representation upon reinstatement. The Committee accepted this testimony, but found that there was no substitution of counsel in Merrill's cases during the period of suspension and that he did not move to withdraw from the cases. Neither did he return client files, records, or property to clients; he retained those files and records at his office and retained unearned fees in his trust and general operating accounts.

The crux of this matter is whether Merrill's actions during his suspension were appropriate. Rule 31(a)(3) provides, in part, that "no member shall practice law in this state or hold himself out as one who may practice law in this state, while suspended." However, exactly what constitutes the practice of law, and just what a suspended or disbarred lawyer can or cannot do, is not

provided in the Rules. Rule 63 provides some direction, but certainly does not address the issue of what constitutes the practice of law.

The Committee and the Commission struggled with Merrill's intent in the subject misconduct. Merrill asserts he was merely trying to do the right thing – complying with the portions of rule 63 referenced in the court's order of suspension, hiring lawyers to handle his cases while he was on suspension, etc. Despite such assertions of good will, while suspended, Merrill kept in his employ a paralegal who had a history of implying he was a lawyer; he allowed his firm, even his paralegal, to continue to accept new clients and their retainers; he continued tc supervise his non-lawyer legal staff; and he continued to be the sole signatory on his trust account and general operating bank account and he signed and issued checks on those accounts. In addition, there was no outward indication that Merrill was on suspension (for example, his office sent out pleadings and correspondence on the letterhead of "The Law Office of Fredrick D. Merrill" or "Fredrick D. Merrill, P.C.," his business cards continued to be displayed on the reception desk, telephones were answered "Law Office of Fred Merrill,"[2] and the sign on the building directory continued to read "The Law Office of Fredrick D. Merrill"). While the Rules may not specifically dictate what acts constitute the practice of law, it seems clear that such actions and circumstances are basic to the practice of law, and are inappropriate during a period of suspension.

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[2] At oral argument, Merrill stated the phones were answered only "Law Offices."

Merrill admits that he did not seek the guidance of the State Bar and did not seek an ethics opinion from the Committee on Rules of Professional Conduct in deciding what conduct would be acceptable for a suspended attorney.[3] The State Bar admits that it does not have specific guidelines as to what a suspended lawyer can, or cannot, do. As the Committee notes, the Rules Committee might well have declined such an inquiry as presenting a question of law rather than ethics. Further, the Court has not as yet had occasion to provide a clear definition of the effects of a suspension from practice. Thus, had Merrill sought guidance, it is possible he still would not have received clear parameters within which to work.

The commission, like all the parties to this proceeding, are troubled by the lack of clear direction in such circumstances. The Commission finds Rule 63 to be instructive on this issue as far as it currently goes; however, it would prefer to see the rule contain more all-encompassing and specific guidelines as to the appropriate conduct for a lawyer who is barred from practicing law.

Despite the apparent lack of a definition of the "practice of law," the Commission has concluded that, at the very least, Merrill's conduct clearly violated Rule 63(a), (b), and (c). The Commission reviewed the American Bar Association's *Standards for Imposing Lawyer Sanctions* for guidance on the appropriate sanction for such a violation. Standard 3.0, providing general factors that should be

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[3] He did seek the advice of his counsel in the former disciplinary proceedings, who advised him to retain other attorneys to handle his cases. Merrill followed this advice.

considered in fashioning the sanction warranted, lists (a) the duty violated, (b) the lawyer's mental state, (c) the potential or actual injury caused by the lawyer's misconduct, and (d) the existence of aggravating or mitigating factors. The Commission finds that Merrill's conduct violated his duty as a professional,[4] that his conduct was intentional, and that the resulting injury could have been serious – particularly had the other parties to the cases handled by Mr. Silvert withdrawn their agreements after learning he was not an attorney.

Standard 7.2, therefore, addressing Violations of Duties Owed as a Professional, is the appropriate Standard to consider in relation to Merrill's conduct. Specifically, Standard 7.2 provides for suspension when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system. Merrill's conduct violated his duty as a professional to uphold the orders and rules that regulate the legal profession.

Finally, the Commission considered the applicable aggravating and mitigating factors, which it finds to be of equal weight. In aggravation are prior disciplinary offenses (in addition to the prior suspension, Merrill was

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[4] While it might appear that a violation of Rule 63 breaches a lawyer's duty to his clients, the Theoretical Framework to the *Standards* indicates that the duties lawyers have to their clients are loyalty, diligence, competence, and candor. These are not the issues raised by a violation of Rule 63. Rather, the *Standards* indicate that practicing law while suspended is a violation of the lawyer's duty as a professional, although it could obviously result in harm to a "client."

previously informally reprimanded in 1992 for unrelated conduct), a selfish motive, and substantial experience in the practice of law. In mitigation are full and free disclosure during the disciplinary proceedings, and remorse; Merrill has admitted, in hindsight, that he should have done things differently, although he could not articulate what alternate actions he might have taken.

Continuing to practice law in any form while suspended is, of course, serious conduct. Two prior cases addressing this issue are *In re Tarletz*, 165 Ariz. 243, 798 P.2d 381 (1991), and *In re Phelps*, 154 Ariz. 516, 744 P.2d 428 (1987), both of which indicate that practicing law while suspended after a previous finding of unprofessional conduct warrants disbarment. However, in both of those cases the respondents were clearly involved in the unauthorized practice of law, and each had significant prior discipline. Such is not the case here. As discussed throughout these proceedings, there is at this point no clear guideline in this state to indicate just what qualifies as "practicing law." Thus, there has been no finding that Merrill was involved in the unauthorized practice of law. The only conclusion that the Commission can reach in this matter is that Merrill violated his obligations under Rule 63. It found no prior cases addressing this particular violation, however.

Thus, in seeking guidance for the appropriate sanction in this matter, the Commission turned to consideration of the purpose of lawyer discipline, which is to protect the public and the profession, rather than to punish the offender. *In re Kersting*, 151 Ariz. 171, 726 P.2d 587 (1986). The sanction imposed should, however, deter the respondent and other attorneys from engaging in similar

unethical conduct. *In re Kleindienst*, 132 Ariz. 95, 644 P.2d 249 (1982). As discussed at length, there can be no conclusive finding of the unauthorized practice of law in this matter. Thus, disbarment would be inappropriate and border on punitive. However, Merrill's clear violation of a court order and court rule is, in itself, serious conduct warranting a suspension.

Merrill's explanations for his conduct during his suspension are inadequate and unconvincing, and both the Commission and Committee find that his conduct was done knowingly. Based on these findings, the majority of the Commission believes a one-year suspension is warranted, as it believes it appropriate to require that Merrill prove rehabilitation before being reinstated.[5] The majority of the Commission also recommends, like the Committee, that Merrill's compliance with Rule 63, in connection with this suspension, be monitored by LOMAP personnel, as detailed above.

RESPECTFULLY SUBMITTED this 13th day of February, 1997.

/s/ Richard N. Goldsmith
Richard N. Goldsmith, Chair
Disciplinary Commission

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[5] Rule 71(h), Ariz.R.S.Ct., requires lawyers who have been suspended for more than six months to demonstrate proof of rehabilitation in a reinstatement proceeding.

Copies of the foregoing were mailed this 14th day of February, 1997, to:

Fredrick D. Merrill, Respondent
100 West Clarendon, Suite 650
Phoenix, Arizona 85013-3527

F. Pendleton Gaines, Chair
Hearing Committee 6D
Two North Central, Suite 2200
Phoenix, Arizona 85004-2390

Stephen M. Kemp, Member
Hearing Committee 6D
8401 West Monroe, Room 340
Peoria, Arizona 85345-6560

Brian R. Warnock, Alternate Member
Hearing Committee 6D
2425 East Camelback, Suite 600
Phoenix, Arizona 85016-4214

Copies of the foregoing were hand-delivered this 14th day of February, 1997, to:

Yigael M. Cohen, Bar Counsel
111 West Monroe, Suite 1800
Phoenix, Arizona 85003-1742

KENDRA A. DIEGAN
Disciplinary Clerk

By: /s/ E. F. Deering

APPENDIX B

STATE BAR OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA FREDRICK D. MERRILL, Attorney No. 005916 Respondent.	)	Nos. 94-1394, 95-0235, and 95-0370 **COMPLAINT** (Assigned to 6D)

(Filed Nov. 27, 1995)

Complaint is made against you as follows:

GENERAL ALLEGATIONS

1. At all times relevant hereto, you were an attorney licensed to practice law in the State of Arizona, having been admitted to practice in Arizona on October 13, 1979. By Supreme Court order, you were suspended from the practice of law for ninety days commencing on June 24, 1994. You were thereafter reinstated on October 6, 1994.

COUNT ONE

2. Notwithstanding this order, on or about June 24, 1994, you met with attorney Dan Durrant to discuss a loss that First Interstate Bank was likely to sustain as a result of the conduct of one of your clients.

3. Thereafter, you met with Durrant and James LeValley, Assistant General Counsel of First Interstate

Bank to discuss your clients' involvement in a check kiting scheme.

4. At that meeting you would not identify your client until you were sure that the bank would agree to negotiate a settlement of the potential loss. You also proposed a potential payment program to Durrant and LeValley.

5. At no time during the course of this meeting did you advise Durrant or LeValley that your license to practice law was suspended.

6. Thereafter, the matter was turned over to Dan Bergin, an Assistance [sic] Vice President and Counsel at First Interstate Bank. You thereafter attempted to negotiate a resolution to your clients' case. At no time did you advise Bergin that your license to practice law had been suspended.

7. Your conduct in htis [sic] regard was in violation of Rule 42, Ariz.R.S.Ct., particularly ER 5.5, and Rule 51(e), (k), and Rule 63.

COUNT TWO

8. On or about June 4, 1994, you were retained by Jerry Klock for representation in a criminal matter.

9. Shortly thereafter you learned that Mr. Klock was also a defendant in a felony from justice originating in Nevada.

10. On or about June 6, 1994, Robert Silvert contacted Scott Mitchell, an Assistant District Attorney in the Clark County District Attorney's Office, and held himself

out as Mr. Klock's Arizona attorney. Mr. Silvert thereafter negotiated a plea agreement on behalf of Mr. Klock.

11. On or about June 20, 1994, Mr. Silvert contacted David Pancoast, a Nevada attorney, and requested that he represent him at the plea agreement. During the course of this conversation, Mr. Silvert again held himself out as an Arizona attorney.

12. You failed to adequately supervise Mr. Silvert and had knowledge that he was holding himself out as an attorney.

13. By letter dated April 27, 1995, you advised the State Bar that Mr. Silvert has never held himself out as an attorney. You also provided an affidavit signed by Mr. Silvert in which he advised that he has never held himself out as an attorney.

14. Both the statements in your response and in Mr. Silvert's affidavit were false and misleading.

15. Your conduct in this regard was in violation of Rule 42, Ariz.R.S.Ct., particularly ER 5.3, ER 5.5, ER 8.1(a), and ER 8.4.

COUNT THREE

16. On July 11, 1994, and during your period of suspension, you were retained by Peter Marella for representation in a DUI matter. You were paid a retainer of $1,500.00 at that time.

17. At the time of your retention, you did not advise Mr. Marella that you had been suspended from the practice of law.

18. Thereafter, you failed to keep your client reasonably informed about the status of his matter, and failed to promptly comply with his reasonable requests for information. Although you did not appear in court with your client during the period of your suspension, your client was advised that you were busy handling other cases or were making another appearance in a different court. In addition, although your client requested that the trial in his matter be continued, neither you nor anyone on your behalf, made any application to continue your client's trial.

19. You engaged in the unauthorized practice of law, engaged in conduct involving dishonesty, fraud, deceit or misrepresentation, and engaged in conduct that was prejudicial to the administration of justice. You willfully disobeyed the order of the Supreme Court placing you on suspension, and never informed your client of your suspension.

20. Your conduct as described above violated Rule 42, Ariz.R.S.Ct., particularly ER 1.2, ER 1.3, ER 1.4, ER 5.5, ER 8.4, and Rules 51(e), (k), and Rule 63(c), Ariz.R.S.Ct.

COUNT FOUR

21. You have previously been sanctioned for violations of the Rules of Professional Conduct. Specifically, in file No. 92-0485, you were suspended from the practice of law for 90 days, placed on one year's probation, and assessed the State Bar's costs on June 24, 1994, for violations of ER 1.8(a) and ER 1.15, Ariz.R.S.Ct. Additionally, in file No. 92-1136, you were informally reprimanded by order dated November 24, 1992, for violations of ER 1.15,

Ariz.R.S.Ct. The entire record in these cases may be reviewed by the hearing committee or hearing officer, with or without your consent, following a decision on the merits, pursuant to Rule 53(c) and Rule 54(k)(4), Ariz.R.S.Ct.

DATED this 27th day of November, 1995.

/s/ Yigael M. Cohen
Yigael M. Cohen
Bar Counsel

Original filed with the
Disciplinary Clerk of the
State Bar of Arizona, this
27th day of November,
1995,

By: /s/ Cassi Taylor